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Our Position

Mental Health America of Texas supports the informed use of psychiatric advance directives. Among other benefits, psychiatric advance directives are important in maintaining patient autonomy, promoting better care and crisis management, and decreasing coercion.

Background

A psychiatric advance directive is a written legal document with which an individual can specify mental health treatment instructions and preferences to prepare for the possibility that he or she may lose the capacity to give informed consent during a period of psychiatric illness.¹ Texas law creates two main psychiatric advance directives: (1) the Declaration of Mental Health Treatment and (2) the Disclosure Statement for Medical Power of Attorney. Forms and instructions for these advance directives are available through the Texas Department of Aging and Disability Services.²

Declaration of Mental Health Treatment

Current Texas law allows an individual to use an advance directive document called a Declaration of Mental Health Treatment to specify his or her wishes regarding psychoactive medication, convulsive therapy, and emergency mental health treatment in the event that a judge finds a person incapacitated to make decisions about his or her treatment. He or she may also specify the order in which restraint, seclusion, or application of medication will be used in an emergency situation, as well as if he or she would prefer a different treatment before these three options. This declaration also contains a section for the individual to describe any additional preferences or instructions (including other conditions or limitations).³

An important component of the Texas Declaration of Mental Health Treatment document is that it requires the signature of two witnesses. The witnesses must affirm that: (1) the individual signing the document is not doing so under duress or coercion, (2) he or she understands what is being signed, and (3) is in a sound state of mind. The witnesses cannot be a health or residential care provider to the signing individual, nor can they be the operator or employee of the community health center providing care to the signer.

Anyone related by blood, marriage, or adoption to the signer is also disqualified, as is anyone with any claim to the estate of the signer upon his or her death.⁴

¹ Getting Started, NATIONAL RESOURCE CENTER ON PSYCHIATRIC ADVANCE DIRECTIVES, <http://www.nrc-pad.org/getting-started> (last visited Oct. 12, 2015).

² Advance Directives, TEXAS DEPARTMENT OF AGING AND DISABILITY SERVICES, https://www.dads.state.tx.us/news_info/publications/handbooks/advancedirectives.html (last updated May 6, 2015) (advance directives forms and instructions).

³ TEX. CIV. PRAC. & REM. § 137.011, <http://www.statutes.legis.state.tx.us/Docs/CP/htm/CP.137.htm> (last visited Oct. 11, 2015).

⁴ Id. at § 137.003 (last visited Oct. 11, 2015).

In Texas, the Declaration of Mental Health Treatment becomes valid the moment that a person signs the document in the presence of two witnesses, and the Declaration takes effect when and if a court declares the person does not have the capacity to make his or her own treatment decisions. The document remains valid for three years after it was signed and the signer can revoke or revise the Declaration at any time, unless a court has already ruled that he or she lacks capacity. Once a court rules that a person lacks capacity, his or her Declaration will remain in effect until he or she regains capacity (even if the three-year period of validity has passed).⁵

Disclosure Statement for Medical Power of Attorney

Another psychiatric advance directive available in Texas is the Disclosure Statement for Medical Power of Attorney. This document transfers authority to make all health care decisions to a designated person if a doctor identifies that the signer is not capable of making those decisions himself or herself. Once a doctor certifies that a person lacks competence to make his or her own treatment decisions, the designated person, or “agent,” receives the legal authority to make decisions for the incapacitated person about a broad range of treatments, including consent or refusal for certain medical treatments or the use of life-sustaining treatment. The agent must make health care decisions in accordance with the signer’s stated wishes, including his or her religious and moral beliefs, even if those wishes conflict with the agent’s own beliefs or ideas. However, an agent cannot legally consent to voluntary inpatient mental health services, convulsive treatment, psychosurgery, abortion, or any other treatment specified in the document by the signer.⁶

The signer has the option of selecting up to two alternate agents, in the case that the original agent is unable or unwilling to act as the signer’s agent. And although a Medical Power of Attorney is valid indefinitely (unlike the Declaration of Mental Health Care), a signer can set a time limit on the document’s validity or revoke the Medical Power of Attorney at any time, unless the signer has already been certified to lack competence by a doctor.⁷ If a doctor has found the signer to lack capacity and the Medical Power of Attorney expires (if the signer identified an end date for the document), the authority granted in the Medical Power of Attorney remains valid until the signer regains competence to make his or her own health care decisions.⁸

Finally, the agent must be at least 18 years of age (with limited exceptions) and cannot function as a care provider for the signer while acting as his or her agent at the same time. The Medical Power of Attorney becomes valid the moment that the person signs it: (1) in front of a notary public (who acknowledges the signature), or (2) in the presence of two “competent adult witnesses” who must qualify based on a list of criteria.⁹

⁵ Id. at § 137.002 (last visited Oct. 11, 2015).

⁶ Medical Power of Attorney. TEX. HEALTH AND SAFETY §§ 166.151-166.166.

⁷ Id. at § 166.155; see also TEX. CIV. PRAC. & REM. § 137.003 (last visited Oct. 11, 2015).

⁸ TEX. HEALTH AND SAFETY § 166.163.

⁹ Id. at § 166.003 & 166.032(b) (last visited Oct. 12, 2015).

Benefits

Psychiatric advance directives have been described by field experts as important tools for promoting patient autonomy and dignity and have been praised for their potential to allow clinicians to provide better care.¹⁰ A 2008 research study concluded that directives are significant in reducing the likelihood of coercive treatment.¹¹ According to Mental Health America, advance directives also have the potential to:

- Promote individual autonomy, empowerment and recovery from mental illness;
- Enhance communication between individuals and their families, friends, healthcare providers, and other professionals;
- Protect people from being subjected to ineffective, unwanted, and possibly harmful treatments or actions; and
- Help in preventing crises and the resulting use of involuntary treatment or dangerous interventions such as restraint or seclusion.¹²

Texas was an early adopter of psychiatric advance directives, passing their Declaration for Mental Health Treatment law in 1997.¹³ Now, approximately two-thirds of states have passed legislation authorizing advance directives specifically for mental health care.¹⁴ However, directives are entirely voluntary and an individual cannot enjoy the potential benefits unless he or she takes the time to discuss his or her rights and wishes with trusted loved ones, health care providers, and/or legal advocates and complete the paperwork.

Recommendations

Psychiatric advance directives are important legal documents with the potential to play a major role in an individual's treatment and recovery process. For this reason, Mental Health America of Texas strongly recommends that those interested in creating psychiatric advance directives:

- Consult an attorney. The State Bar of Texas Lawyer Referral Information Service is an excellent source for finding someone who can help.¹⁵
- Remind anyone considering authorizing an agent to make medical decisions on his or her behalf to select someone who will faithfully comply with his or her expressed values and desires.

¹⁰ Heather Zelle, Kathleen Kemp & Richard J. Bonnie, Advance Directives for Mental Health Care: Innovation in Law, Policy, and Practice. 66 LAW & PSYCHIATRY 7 (Jan. 1, 2015), <http://ps.psychiatryonline.org/doi/pdf/10.1176/appi.ps.201400435>.

¹¹ Jeffrey W. Swanson, Marvin S. Swartz, Eric B. Elbogen, Richard A. Van Dorn, H. Ryan Wagner, Lorna A. Moser, Christine Wilder & Allison R. Gilbert, Psychiatric Advance Directives and Reduction of Coercive Crisis Interventions. 17 JOURNAL OF MENTAL HEALTH 1, 9 (Jan. 1, 2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2835342/pdf/nihms-126157.pdf>.

¹² Position Statement 23: Psychiatric Advance Directives, MENTAL HEALTH AMERICA (Sep. 17, 2011), <http://www.mentalhealthamerica.net/positions/psychiatric-advance-directives>.

¹³ Declaration for Mental Health Treatment TEX. CIV. PRAC. & REM. §§ 137.001-137.011 (last visited Oct. 11, 2015).

¹⁴ Zelle, *supra* note 10, at 7.

¹⁵ For more information about the State Bar of Texas Lawyer Referral Service, please visit: <https://www.texasbar.com/lris/>.

We also strongly encourage legislators, friends and family, service providers, and other community members to prioritize education and discussion to strengthen the use and quality of psychiatric advance directives in Texas. Specifically, Mental Health America of Texas recommends:

- Legislators prioritize laws that uphold safeguards to insure that (1) a person's decisions about medical treatment or life-sustaining medical care are fully informed and free from coercion, and (2) mental health providers must comply with valid psychiatric advance directives unless to do so would result in serious and imminent physical harm to the individual or others (including when a person is involuntarily committed to a psychiatric hospital);
- Individuals, family members, friends, advocates, healthcare providers, and other professionals should work together to promote education, training, and research towards the successful creation and implementation of psychiatric advance directive programs; and
- Provider agencies and inpatient/outpatient facilities should be educated about and should be encouraged to ask people coming in for services/treatment if they have an advance directive.¹⁶

For more information, please visit Mental Health America's position statement on psychiatric advance directives.¹⁷

¹⁶ MENTAL HEALTH AMERICA, *supra* note 12.

¹⁷ *Id.* at <http://www.mentalhealthamerica.net/positions/psychiatric-advance-directives>.